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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

HILARIO LARRY GUEVARA,

Defendant and Appellant.

C077477

(Super. Ct. No. 14F02185)

A jury found defendant Hilario Larry Guevara guilty of felony false imprisonment (Pen. Code, § 236; unless otherwise set forth, statutory references that follow are to the Penal Code) and misdemeanor resisting arrest (§ 148, subd. (a)(1)). Prior to sentencing, defendant made a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118) seeking substitute counsel to file a motion for new trial based on ineffective assistance of counsel. The trial court denied the motion and defendant appeals this ruling. We affirm.

FACTS AND PROCEEDINGS

Defendant and his friend, Stafford, blocked a victim while he was stopped in a park taking a picture. Defendant, apparently thinking the victim was a law enforcement officer, said he had a gun and they prevented the victim from leaving. Eventually they allowed the victim to leave and he called law enforcement. Officer McGovern responded to the call, stopped defendant, and got defendant's consent to search his person. Stafford started fighting with McGovern. Defendant got in the middle of the fracas, and interfered with McGovern handcuffing Stafford. Officer Lazark later brought the victim to the police station and he identified defendant and Stafford.

An information charged defendant with resisting an executive officer (§ 69) and false imprisonment (§ 236). The information further alleged defendant had served two prior prison terms and had a prior serious felony conviction. After a two-day trial, a jury found defendant not guilty of resisting an executive officer, but guilty of the lesser included offense of misdemeanor resisting arrest, and guilty of false imprisonment. In bifurcated proceedings, defendant admitted the prior conviction (§§ 667, 1170.12) and prior prison term (§ 667.5, subd. (b)) allegations were true.

Prior to sentencing, defendant filed a motion for new trial alleging insufficient evidence to sustain the verdict. He also advised the trial court he wanted an attorney appointed to look into the possibility of filing a motion for new trial based on ineffective assistance of counsel. Accordingly, the court held a *Marsden* hearing.

First, defendant contended counsel had failed to call Officer Collette Chaimparino, the officer who took a statement from the victim, as a witness. Second, defendant indicated he had wanted to testify on his own behalf, and would have taken the stand, except there was an error on his rap sheet. The error incorrectly identified one of his convictions, for violating section 647.6, as a felony. In fact, it was a misdemeanor conviction. He indicated he had advised counsel of this error well before trial and

counsel did not get it corrected until after trial, before sentencing. Third, defendant had a number of motions he wanted counsel to file on his behalf, including a motion requesting the 911 transcripts, and a motion for vindictive prosecution. Fourth, defendant claimed trial counsel did not accurately advise him regarding the plea offer at trial, specifically he did not understand what a four-year lid deal was and counsel advised him not to take the plea because the judge would sentence him to a four-year term anyway. Defendant believed the relationship between himself and counsel had broken down so much they could no longer work together.

Defense counsel responded, delineating his experience over 10 years, including multiple felony jury trials, both as a public defender and in private practice. He had met with defendant numerous times before trial, went to the scene with codefendant's counsel, and reviewed all the discovery. Counsel also responded to each of defendant's specific claims. First, he made the tactical decision not to call Officer Chaimparino as a witness, although she was under subpoena, because after the victim testified on direct and cross-examination, he did not believe Chaimparino's testimony was necessary. Second, as to the correction of the rap sheet, defense counsel got the information corrected prior to sentencing, which is what it appeared most relevant to. Counsel indicated defendant had not informed him that if the information had been corrected earlier, defendant would have testified at trial. Moreover, even with the conviction corrected, counsel would have advised defendant against testifying, based on the entirety of his record which showed recent violent felony convictions, including an assault with a deadly weapon and resisting arrest. Third, counsel said he explained what the plea offer was to defendant and defendant was clear, he did not want a four-year offer. Also, counsel stated he generally does not tell clients whether they should accept an offer. He did not think he had told defendant the court would sentence him to four years but rather, that it could. Fourth, as to the motions, he did not think there was a legal basis for a vindictive prosecution motion.

Counsel acknowledged he had had trouble communicating with defendant since the trial, and that there had been some breakdown in the relationship. Upon further discussion, counsel indicated he believed he was competent and capable of representing defendant and continued to be willing to do so. He acknowledged that while he believed he had performed competently at trial, it was difficult to evaluate his own performance. He also did not believe there were any other grounds for a motion for new trial.

The trial court found that although there were conflicts between defendant and defense counsel's statements, defense counsel had properly represented defendant's legal interests and could continue to do so. The trial court believed there was some revisionist history going on by defendant, that the decision not to call Chaimparino was a tactical decision, that trial counsel had appropriately represented defendant at trial, and that counsel was still able to continue to properly represent defendant. Accordingly, the trial court denied the *Marsden* motion.

DISCUSSION

Defendant contends the trial court abused its discretion by denying his postconviction *Marsden* motion. He argues he and counsel had an irreconcilable conflict. We find no abuse of discretion.

“ ‘When a defendant seeks substitution of appointed counsel pursuant to *People v. Marsden*, *supra*, 2 Cal.3d 118, “the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance.” ’ ” (*People v. Streeter* (2012) 54 Cal.4th 205, 230 (*Streeter*)). “[S]ubstitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and

the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].” (*People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*)). The standard is the same, whether the *Marsden* motion is made pre or postconviction. (*Id.* at p. 694.) We review a trial court’s denial of a *Marsden* motion for abuse of discretion. (*Ibid.*) “ ‘Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel.’ [Citations.]” (*People v. Hart* (1999) 20 Cal.4th 546, 603.)

“ ‘If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant’s claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a “colorable claim” of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]’ [Citation.]” (*Smith, supra*, 6 Cal.4th at pp. 692–693.) That is, defendant is required to “credibly establish[] to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel’s failings.” (*People v. Stewart* (1985) 171 Cal.App.3d 388, 397, disapproved on other grounds in *Smith*, at pp. 691-696.)

“[T]actical disagreements between a defendant and his attorney or a defendant’s frustration with counsel are not sufficient cause for substitution of counsel.” (*Streeter, supra*, 54 Cal.4th at p. 231.) Trial counsel has the authority and the duty to control the proceedings, including matters such as deciding what witnesses to call, whether and how to conduct cross-examination, what motions to make, and most other strategic and tactical decisions. (*People v. McKenzie* (1983) 34 Cal.3d 616, 631, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365.) A lack of trust in

appointed counsel, the failure to get along with counsel, or the fact that there are heated exchanges between client and attorney does not require a substitution of counsel. (*People v. Jones* (2003) 29 Cal.4th 1229, 1246; *Smith, supra*, 6 Cal.4th at pp. 696–697; *People v. Bills* (1995) 38 Cal.App.4th 953, 961.) To the extent there is a credibility question between defendant and defense counsel at the hearing, the trial court is “ ‘entitled to accept counsel’s explanation.’ ” (*Smith*, at p. 696.)

Here, the trial court made an adequate inquiry prior to denying the motion, heard defendant’s complaints about defense counsel, and defense counsel’s responses. Defendant did not credibly establish that counsel failed to perform with reasonable diligence and that, he might have had a more favorable result in the absence of counsel’s failings. Defendant’s complaints about counsel not calling a particular witness or not filing motions were clearly tactical matters within counsel’s discretion. Moreover, counsel indicated the information likely to be elicited from Chaimparino was obtained through the victim’s direct and cross-examination and that he did not feel there was a legal basis for the motions defendant wanted filed. Counsel also explained the delay in correcting defendant’s rap sheet, stating defendant had not informed counsel he would testify but for that section 647.6 conviction being inaccurately recorded as a felony rather than a misdemeanor. Further, defense counsel noted, even if that conviction had been correctly reflected, he would have advised defendant against testifying, given his other violent prior convictions. The trial court was entitled to disbelieve defendant’s late claim that but for this inaccurate point in his rap sheet, he would have testified. Defense counsel also explained the advice he gave defendant as to the plea offer. The trial court was entitled to believe counsel’s statements over defendant’s. Finally, as to the claimed breakdown of their relationship, counsel indicated that although there had been some challenges in communicating with defendant, of late he could continue to represent defendant competently and was willing to do so. Accordingly, defendant and defense counsel were not embroiled in such an irreconcilable conflict that ineffective assistance

of counsel was likely to result. The trial court found counsel credible, that defendant was engaging in some revisionist history, and that counsel could competently perform his duty. The trial court was entitled to make those determinations. (*Smith, supra*, 6 Cal.4th at p. 696.)

DISPOSITION

The judgment is affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ MURRAY _____, J.

_____ RENNER _____, J.